Supreme Court, U.S.
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No. 98-1649

In The

Supreme Court of the United States

SEA-LAND SERVICE, INC.,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; SIR GEAN AMOS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a claimant under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq.* ("LHWCA), is entitled to both select his or her treating physician and decide, in conjunction with that treating physician, what treatment he or she will undergo.

2. Whether the Court of Appeals erred in affirming a rule of evidence, consistent with established principles of workers' compensation law and the LWHCA, that the opinion of a treating physician is entitled to special deference where treatment has been recommended.

3. Whether there was substantial evidence presented which would support the conclusion of the Administrative Law Judge below that the treatment recommended by claimant's attending physician was not reasonable and appropriate medical treatment.

LIST OF PARTIES AND AFFILIATES

Petitioner's list of parties and affiliates is accurate.

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STATEMENT OF THE CASE

This case involves a claim for benefits by Sir Gean Amos, a worker and employee of Appellant Sea-Land Service, Inc., under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq.* (LWHCA). Mr. Amos had been employed by Sea-Land from 1973 until he suffered injuries on the job which form the basis of the matter before the Court. On July 25, 1990, while working as a warehouseman-loader checker, Mr. Amos suffered injuries to his nose, shoulders, and back. (App. 25, 32).

Mr. Amos ultimately came under the care of Dr. Larry Pedagana, an orthopedic surgeon who specializes in the treatment of upper extremities, and whose practice includes service as physician and consultant for major league baseball and professional football teams. (App. 3). Dr. Pedagana recommended surgery for removal of a spur in Mr. Amos' right shoulder, which was designed to relive symptoms of right shoulder impingement syndrome. (App. 3, 26).

Rather than authorize the requested surgery, Sea-Land obtained the opinion of Dr. Kenneth Sawyer, an orthopedic surgeon. Dr. Sawyer acknowledged that the surgery recommended by Dr. Pedagana might improve Mr. Amos' symptoms, but did not recommend it because, in his opinion, the surgery would not make Mr. Amos asymptomatic, and would not result in Mr. Amos being able to return to his former work. (App. 4).

The employer then required Mr. Amos to be seen by another of its examining orthopedic surgeons, Dr. Stephen Sears. Dr. Sears, a general orthopedist, whose practice involves 30% spinal problems, 30% knee problems, and 40% "a little bit of everything," testified on behalf of the employer. As noted in the opinion of the Ninth Circuit Court of Appeals, (App. 5), Dr. Sears stated in his deposition that:

> "I can't say 100 percent that this individual can't be helped with surgery of his shoulder. There's a judgment decision here. But in my opinion he will not be helped with surgery. . . . I would be nervous about performing the surgery, primarily because I don't like doing surgery and have the patient come back and say, Dr. Sears, I'm no better. And I think there's a good likelihood that this will happen. . . . I don't think he's going to be any better from this surgery. You know I could be wrong, but that's my opinion. . . . So I quite frankly look at the shoulder as a delaying tactic with regards to any surgery that might be done. I think you're going to have to face the central issues sooner or later and now's a good time. To me the issue is can this individual work in the job that he had or can he not? I think he can and I think that's the central issue that's going to have to be faced and I think surgery would merely put off dealing with that issue." (App. 5).

Based upon the opinions of these two examining physicians, Sea-Land denied authorization for the surgery, and Mr. Amos requested a formal hearing. The central issue on appeal was the entitlement to the requested surgery under § 907 of the LHWCA. (App. 5). The Administrative Law Judge (ALJ) awarded Mr. Amos compensation for permanent partial disability at a rate of $21.87 per week, but

denied the medical treatment recommended and requested by Dr. Pedegana. (App. 46-47). The order was based, at least in part, upon the ALJ's reliance on the fact that the evaluation of Dr. Sears, the examining physician, was more current in time. (App. 36).

Mr. Amos appealed the decision to the Benefits Review Board (BRB), but the BRB did not issue a decision. Rather, the decision was deemed affirmed under Pub. L. 104-134, 110 Stat. 1321-219, Omnibus Consolidated Rescission and Appropriations Act of 1996 because the case had been pending before the BRB for more than twelve months as of September 12, 1996. (App. 7, 20). Mr. Amos then filed a Petition for Review with the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed and remanded, concluding that, under § 907 of the LWHCA, Mr. Amos was entitled to his choice of attending physicians. The Ninth Circuit further concluded that, absent substantial evidence that the treatment recommended by Dr. Pedegana was not reasonable and appropriate, Mr. Amos was entitled to the benefit of that recommended treatment (App. 9). It was recognized by the Ninth Circuit panel that the opinion of Dr. Pedegana, as treating physician, was entitled to special deference. (App. 9-10).

Sea-Land Service, Inc. petitioned this Court for a writ of certiorari, which should be denied.

REASONS FOR DENYING THE WRIT

The petition is based upon claims that the Ninth Circuit decision is contrary to the substantial evidence

rule, departs from settled case law, and exceeds the court's authority by substituting that court's view of the evidence for that of the ALJ. None of these assertions has merit. Nothing presented by Petitioner disclosed a legal issue worthy of compelling certiorari. Further, the substantial evidence rule, cited and relied upon by Petitioner, clearly supports the Ninth Circuit decision.

1. Under the LWHCA, a claimant is entitled to select his or her treating physician, and is entitled to undergo the treatment recommended by that physician.

The Ninth Circuit correctly concluded that Mr. Amos was entitled to select Dr. Pedegana as his attending physician under 33 U.S.C. § 907(b). That section specifically provides:

> "The employee shall have the right to choose an attending physician authorized by the Secretary to provide medical care under this Act as hereinafter provided."

33 U.S.C. § 907(b).

Mr. Amos exercised this entitlement. However, the petitioner/employer claims that, although Mr. Amos had the right to select a treating physician, he was not entitled to the treatment recommended by that physician. This would clearly defeat the purpose of the section allowing the claimant to select an attending physician.

2. Under established principles of workers compensation law and the Longshore and Harbor Workers' Compensation Act, the opinion of a treating physician is entitled to special deference where treatment has been recommended.

Petitioner has argued that the Ninth Circuit's opinion departs from established case law that stands for the proposition that the trier of fact is not bound to accept the opinion of any particular medical examiner, but may accept or reject any witness's testimony. This is a misstatement of the Ninth Circuit decision. That court has not required that the trier of fact be bound by the opinion of any particular physician. The Ninth Circuit actually held that, where there is more than one reasonable opinion regarding the need for specific medical treatment, the trier of fact cannot reject the opinion of the attending physician without making a finding, based upon substantial evidence, that the treatment recommended by that attending physician is not reasonable and appropriate.

This is a far cry from departing from settled law. The trier of fact, the ALJ in this case, may still reject the opinion of the treating physician regarding the need for specific treatment. The Ninth Circuit continues to recognize the rule that an employer is not required to pay for unreasonable and inappropriate treatment. (App. 9-10). The Ninth Circuit does, however, follow established law in recognizing the principle that the opinion of a treating physician, under the LWHCA, is entitled to special weight. (App. 8). Although the Ninth Circuit cites Social Security cases in so holding, other courts have similarly held in Longshore and other worker's compensation cases, including Black Lung Claims.

In *Pietrunti v. Director, Office of Workers' Compensation Programs,* 119 F.3d 1035, 1042 (2d Cir. 1997), the Second Circuit noted the doctrine that the opinion of an attending physician is entitled to great weight. That court stated that:

> "An ALJ is nonetheless bound by an expert opinion of a treating physician as to the existence of a disability unless contradicted by substantial evidence to the contrary."

Pietrunti, 119 F.3d at 1042.

The case of *Tussey v. Island Creek Coal Co.,* 982 F.2d 1036, 1042 (6th Cir. 1993) is consistent with the doctrine of giving greater weight to the opinions of treating physicians.

> "It is clearly established that opinions of treating physicians are entitled to greater weight than those of non-treating physicians . . . The ALJ in the present case gave lip service to this rule, but failed to apply it."

Tussey, 982 F.2d at 1042. *Tussey, supra,* not only acknowledges the requirement of affording greater weight to the opinion of the treating physician, in Black Lung cases, it requires that the ALJ follow the rule, rather than merely applying lip service to it.

The Ninth Circuit, in the instant case, has merely affirmed an established doctrine of law. It is misleading to assert that the court has disregarded established law when it has not done so. What the Ninth Circuit has done is merely clarify what the ALJ can and cannot do regarding the recommendations of treating physicians. It is clearly permissible to require that an ALJ be allowed to

reject the recommendations of treating physicians only upon considering substantial evidence that the recommendations for treatment are unreasonable or inappropriate.

3. No substantial evidence was presented that the surgical treatment recommended by the treating physician was unreasonable and inappropriate, thus the ALJ was without authority to reject that recommendation.

Petitioner is correct in stating that the proper standard for review is the substantial evidence rule. *Pietraunti, supra, Tussey, supra.* A long line of cases, from various jurisdictions, confirm this standard. However, the substantial evidence rule does not mean, as intimated by petitioner, that the decision of an ALJ cannot be reversed because of failure to base a decision on substantial evidence.

In *Odom Construction Co. v. United States Department of Labor,* 622 F.2d 110, 115 (5th Cir. 1980), the Fifth Circuit Court of Appeals held that an ALJ decision must be upheld if supported by substantial evidence. However, that court also stated that, in implementing that rule:

> "All doubts are to be construed in favor of the employee in accordance with the remedial purposes of the Act"

Odom, 622 F.2d at 115.

Similalry, in *Randall v. Comfort Control, Inc.,* 725 F.2d 791, 796 (D.C. Cir. 1984), the D.C. Circuit Court of

Appeals ruled that the decision of an ALJ must stand if supported by substantial evidence, but also stated:

> "In addition, this court has held that in applying this standard of review, 'the beneficent purposes and humanitarian nature of the Act must be borne in mind,' and that 'doubtful questions, including factual ones . . . must be resolved in favor of claimants.' "

Randall, 725 F.2d at 796.

The Ninth Circuit, in *Matulic v. Director, Office of Workers Compensation Programs*, 154 F.3d 1052 (9th Cir. 1998), citing *Odom, supra*, and *Randall, supra*, also recognized the substantial evidence rule. That court clarified the rule by stating that a review of decisions would be for errors of law and failure to adhere to the substantial evidence rule. The court recognized the beneficent purposes and humanitarian nature of the Act, and held that all doubts are to be construed in favor of the employee in accordance with the remedial purpose of the Act.

The Third Circuit Court of Appeals adds further clarity to the substantial evidence rule in the case of *Nelson v. American Dredging Co.*, 143 F.3d 789, 793 (3rd Cir. 1998).

> "When factual findings are at issue, we . . . make an independent factual review to determine whether the Administrative Law Judge's findings were supported by substantial evidence".

Nelson, 143 F.3d at 793.

It is clear that the Ninth Circuit, in the case at hand, has followed the substantial evidence rule of review, which is indisputably the correct standard of review

under the LHWCA. The ALJ below ordered that the employer/carrier, petitioner herein, remained liable for any future reasonable and necessary medical expenses, per section 7 of the Act, resulting from the injury of 7/25/90. However, the ALJ also ruled in the order that the right shoulder surgery recommended by Dr. Pedegana was not reasonable and appropriate medical treatment. (App 47). The Ninth Circuit reviewed the evidence, conducting an independent factual review noted in *Nelson, supra.* The court determined that there was, in fact, no substantial evidence presented upon which the ALJ could base rejection of the surgery recommended by the treating physician, Dr. Pedegana. (App. 9-10).

Although, as noted by petitioner, the ALJ discussed her reasons for selecting the opinions of examining physicians over that of the treating physician (App. 40-42), it is submitted that the discussion amounted to only the "lip service" discussed in *Tussey, supra.* The Ninth Circuit, apparently in consideration of the beneficent purposes of the Act, concluded that this discussion did not amount to the substantial evidence required to justify rejecting the surgical recommendation of Dr. Pedegana.

Contrary to the position espoused by petitioner, the Ninth Circuit has not created a new standard of either review, and confirms, rather than departs from, established law regarding the claimant's right to § 907 medical benefits.

CONCLUSION

The petition discloses no compelling reasons to grant a Writ of Certiorari. It should therefore be denied.

Respectfully submitted,

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